Due service of the within brief is hereby acknowledged this _____ day of April, A. D. 1938.

_____

Attorneys for Petitioners.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1937.

No. 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON and ALFRED M. MACDONALD,

Petitioners,

v.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, a corporation, CHARLES ROSS COOPER, *et al.*,

Respondents.

Brief of Respondents, Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel in Opposition to Petition for Certiorari.

T. B. COSGROVE,
JOHN N. CRAMER,
1031 Rowan Bldg., Los Angeles, Cal.,
Counsel for Respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.

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I.

II.

III.

IV.

SUBJECT INDEX.

PAGE

TABLE OF AUTHORITIES CITED.

CASES. PAGE

CODES AND STATUTES.

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I.

Opinions Below.

The opinion of the State Supreme Court has not been officially reported, but has been printed in the advance opinions of that court, 94 Cal. Dec. 681, and in the Pacific Reporter, 74 Pac. (2d) 761. It appears

in the record [R. 1516 *et seq.*]. Although not strictly a part of the record, the oral opinion of the trial court was transcribed and may be found in the record, pages 1469 *et seq.*

II.

Jurisdiction.

Petitioners invoke the jurisdiction of this court under section 237 (b) of the Judicial Code (U. S. C., Title 28, Sec. 344 (b)).

Two of the ten points urged by petitioners involve rights claimed by them under the Constitution of the United States. While federal questions are thus presented, it is the position of these respondents that (1) the questions are not of serious import; (2) they are unsubstantial; and (3) the one urged to, and considered by, the State Supreme Court was decided by that court in accordance with the applicable decisions of this court.

The other points made by petitioners involve the question whether the state court under the pleadings ever obtained jurisdiction of the subject matter, asserted errors of the state court in interpreting state statutes, and the effect of valid orders of the Superior Court. These we conceive to be purely matters of state law, and the supposed error of the State Supreme Court in deciding them, although asserted to be a denial of due process, does not, we contend, present federal questions reviewable here.

III.

Statement.

The respondents submitting this brief in opposition o the petition for *certiorari* were for many years gen- ral agents of The Pacific Mutual Life Insurance Com- any of California (the old company) [R. 1259-1265]. our of them are holders of life policies and non-can- ellable income policies issued by the Old Company [R 266-1269], and they own in the aggregate more than ,000 shares of its capital stock [R. 1270]. They inter- ened in the proceedings before the Superior Court on heir own behalf and on behalf of all the general agents nd managers of the Old Company [R. 1258] and filed riefs in the State Supreme Court in support of the rder approving the Insurance Commissioner's revised lan of rehabilitation.

These respondents cannot accept the statement of the ase as made by petitioners (Petition pp. 4-11). A cor- ect and accurate statement of the facts and the pro- eedings in the Superior Court is given in the opinion f the State Supreme Court [R. 1516-1544]. In the nterests of brevity we will not give a restatement of he facts, but instead we will briefly point out the more utstanding errors in petitioners' statement and supply the missions of important facts.

It is conceded, that all orders made in the Superior Court by Judge Douglas L. Edmonds are void by rea- on of the fact that he was a policyholder in the Old Company and thereby disqualified [R. 1526-1527]. We

admit that the order of Judge Edmonds appointing the Commissioner conservator has not been set aside by the Superior Court (Pet. p. 10). But we take issue with petitioners' statement (Pet. p. 10) that the remaining orders of Judge Edmonds have never been set aside and that they stand unimpaired at the moment, affirmed by the highest state court. While the record does not affirmatively state that Judge Edmonds' order appointing the Commissioner liquidator and his orders approving the Commissioner's original plan and an amendment thereto have ever been vacated, it does contain unequivocal indication that such is the fact, for Judge Willis, in his order of December 4, 1936, approved a new and revised plan of the Commissioner, referred to him as conservator, and spoke of him as being thereafter appointed liquidator [R. 1378 *et seq.*, particularly 1389]. The State Supreme Court declared that all of Judge Edmonds' orders were void [R. 1526-1527] and under no possible construction of the opinion of that court or the order appealed from can it possibly be said that any of Judge Edmonds' orders were affirmed by the State Supreme Court.

We also take issue with the statement of petitioners, that the amended plan was again approved on December 4, 1936, that the order was *nunc pro tunc*, and that the void orders of Judge Edmonds were reconfirmed (Pet. p. 11). Most particularly we disagree with the statement of petitioners that without the confirmation of the void orders the whole proceedings fall (Pet. p. 11). These assertions apparently are based upon the fact that Judge Willis in his order of December 4, 1936, ratified and confirmed the acts of the Commissioner and the prior conveyance of the assets made on July 22, 1936

[R. 1387-1388] and that the effective date of the rehabilitation agreement approved in said order was July 22, 1936 [R. 1398].

The State Supreme Court, deciding a matter of state law, expressly and explicitly held that although the Commissioner was not on July 22, 1936, either conservator or liquidator or authorized by any valid order of the Superior Court to take over the business of the Old Company, yet he could, and did lawfully under section 1013 of the Insurance Code, take over and operate such business and could and did lawfully and legally conduct such business through the agency or instrumentality of the New Company [R. 1527-1529].

A distinction must be made between the void orders of Judge Edmonds and the lawful acts of the Commissioner. The latter could be and were ratified, but this does not mean that the void orders were confirmed. In the single instance where Judge Willis purported to ratify Judge Edmonds' order appointing the Commissioner conservator [R. 325], he also made the appointment himself *de novo* [R. 325], and, even if it be assumed that orders made by a disqualified judge cannot be adopted or ratified by a qualified judge, the fact that Judge Willis attempted to do so cannot vitiate the balance of his order.

Under the heading, "Reasons relied on for the allowance of the writ," petitioners say (Pet. p. 12) that the State Supreme Court "held that title to all of the assets of the old company * * * was lodged in the new company * * * on July 22, 1936, by the Commissioner's conveyance made pursuant to the void orders of the lower court." This is not a correct construction

of the decision of the California Supreme Court. That court stated that the conveyance to the New Company occurred pursuant to statutory authority and order of court [R. 1541]. It was not necessary to determine, and the State Supreme Court did not determine at what precise moment title vested in the New Company. It is possible that on August 11, 1936, the title of the Commissioner related back to July 22, 1936 (compare, *Hiscock v. Varick Bank of New York*, 206 U. S. 28, 40; *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 307; *Fairbanks Shovel Co. v. Wills*, 240 U. S. 642, 649), so that the New Company's title likewise related back by ratification under the order of December 4, 1936. On the other hand it may be that the New Company did not acquire title until after December 4, 1936, by a new conveyance authorized that day by the court and presumably made by the Commissioner. If the order of December 4, 1936 is otherwise valid, it is not easily perceived how or in what manner petitioners (who are policyholders) have been injured, much less deprived of constitutional rights, or how the validity of said order can be questioned in this court, because (as claimed) title vested in the New Company as of July 22, 1936.

Petitioners assert that nothing was said by the Commissioner in his petition for appointment as conservator about the insolvency or hazardous condition of the Old Company on July 22, 1936 (Pet. p. 12). Although this statement is contrary to fact, its consideration more

properly belongs in the argument, where we will briefly treat it.

Petitioners say that the Supreme Court of California held "that all of the orders made in consummation of the reorganization were absolutely void" (Pet. p. 15). This is not a correct statement. The State Supreme Court expressly held that, while all of Judge Edmonds' orders were void, "The subsequent proceedings before Judge Willis stand by themselves independently of the prior orders" [R. 1527], and that Judge Willis' orders were valid.

Petitioners further assert as a reason for the allowance of the writ of certiorari that "no liquidator was ever appointed for the old company" and that a dissenting policyholder "had no place to go. His policy was lost, because the court provided no liquidator with whom he could file his claim." (Pet. p. 17). It is true that the only order appointing a liquidator which *appears in the record* is Judge Edmonds' order of July 22, 1936, which was held void by the State Supreme Court. But the rehabilitation agreement approved by Judge Willis in his order of December 4, 1936, in terms contemplated the appointment of the Commissioner as liquidator [R. 1421] and the order, itself, likewise had such appointment in contemplation [R. 1389]. Moreover, jurisdiction was expressly reserved [R. 1390] as the State Supreme Court pointed out [R. 1526].

In the proceedings before Judge Willis the Commissioner was first appointed conservator, then his revised

plan was approved. The third step, that of appointing the Commissioner liquidator, naturally had not been taken by December 4, 1936, which is the point of time to which the record from the Superior Court carries these proceedings. The presumption is that the Superior Court performed its duty and appointed the Commissioner liquidator.*

In considering the arguments advanced by petitioners and by *amici curiae* it is important to bear in mind that the record before the State Supreme Court consisted of the judgment roll alone. No evidence was brought up. At the time petitioners took their appeal to the State Supreme Court it had long been and still is the rule that in such case every intendment is in favor of the judgment or order appealed from, and if error does not affirmatively appear, the judgment below will be sustained if there is any possible ground on which it can be sustained (*Myers v. Canepa,* 37 Cal. App. 556, 560), and that facts alleged in the pleadings or recited in the order which tend to support the order are deemed to have been proved by competent evidence (*Gray v. Gray,* 185 Cal. 598, 599). The State Supreme Court in its opinion applied these rules [R. 1528 and 1539].

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*NOTE: While the contention that no liquidator was appointed was evidently not made below [R. 1544], it seems obvious that the state Supreme Court either relied on this presumption or upon its judicial knowledge. In any event that court expressly held that dissenters "are allowed and will be paid the amount allowed by law as the measure of damages * * *." [R. 1539.]

IV.

ARGUMENT.

Prefatory Statement.

Of the ten points urged by petitioners, point D (that Judge Edmonds' orders were void) may be conceded. Seven points, A, B, C, E, F, G and I, deal with asserted errors of the State Supreme Court in deciding matters of state law and do not present a federal question. Moreover, they are based upon a misconception of the decision of that court. They furnish no valid reason for granting certiorari. Only two points (H and J) even remotely involve federal questions. Point H (that Sec. 1043 of the Insurance Code is so vague and uncertain as to be unconstitutional) was not raised below. But the point, we believe, is without merit. The remaining constitutional point was passed on by the State Supreme Court and, we submit, decided in accordance with the applicable decision of this court. Both points concern matters so unsubstantial on the record that they furnish no ground, it is believed, for granting the writ of certiorari.

Summary of the Argument.

A. Petitioners' contention (Pet. pp. 33-36) that the allegations of the Commissioner's petition for his appointment as conservator were insufficient in substance and, since the proceedings were special, the Superior Court did not acquire jurisdiction, is without merit. The allegations of the Commissioner's petition were clearly sufficient, and the State Supreme Court so held, and this holding on a matter of state law is conclusive here. No

federal question is presented. Petitioners were accorded due process of law.

B. The contention of petitioners that the New Company's title to the assets was lodged in it by the void order of Judge Edmonds is completely answered by the fact that Judge Willis made a new order vesting title in the Commissioner and thereafter ratified the prior conveyance and authorized a new one. Petitioners are not aggrieved by the holding of the Supreme Court that the Commissioner's seizure was proper under section 1013 of the Insurance Code, although he was then neither conservator nor liquidator. This seizure was a preliminary step and petitioners, as policyholders, were at no time entitled to the possession of the assets. They cannot logically contend that the proceedings of July 22 were void (so that the Commissioner then had no title to convey) and in the next breath claim that the Commissioner had nevertheless passed title to such assets to the New Company so that Judge Willis could not vest him with title on August 11th.

C. Petitioners cannot properly contend that the decision of the State Supreme Court is void as being in direct violation of law, because that court held that the Commissioner during rehabilitation could conduct the business of the Old Company through his corporate instrumentality, the New Company. This question was peculiarly a matter of state law which it was the exclusive province of the State Supreme Court to decide and the asserted error in that regard is not reviewable here. Nor does the alleged error amount to a denial of due process of law. In any event it does not appear that petitioners are aggrieved.

D. Nor can petitioners properly assert that said decision is erroneous because the state court construed the California Insurance Code as authorizing the Commissioner to rehabilitate the business of an insurance company by means of a new corporation. Such contention does not present a federal question.

E. The provision of the California Insurance Code, that the Commissioner may, subject to the approval of the court, enter into rehabilitation agreements, is not vague or uncertain and is constitutional. Said section is a grant of power to be exercised by the Commissioner under the direction of the Superior Court. He is neither forbidden nor required to enter into such agreements and neither he nor the other party to the agreement acts at his peril. The term "rehabilitation agreements" has a well recognized meaning.

F. The conveyances were neither fraudulent nor void. The transfer from the Old Company to the Commissioner was effected by Judge Willis' order of August 11th and the express provisions of section 1011 of the Insurance Code. The transfer from the Commissioner to the New Company was made pursuant to Judge Willis' order of December 4th, and obviously could not be a fraudulent conveyance. The fact that the Old Company joined in the deed and bill of sale of July 22, 1936, from the Commissioner to the New Company is immaterial.

G. There has been no impairment of the obligation of contract or any unlawful discrimination between holders of non-can policies and life policyholders. Holders of life policies are given two options, to consent and have their policies assumed in full by the New Company or to dissent and receive the full amount of their provable

claims. Holders of non-can policies are likewise given two options, to consent and have their policies unconditionally assumed as to part and conditionally assumed as to the balance, or to dissent and receive the full amount of their provable claims. No policy holder has a constitutional right to insist upon complete liquidation. All dissenters are treated alike. It is to be presumed that dissenters of every class will receive as much, or more, as they would on complete liquidation. It is likewise to be presumed from the record that holders of non-can policies who consent will receive greater benefits than they would on complete liquidation. The contention that dissenters of all classes are left without remedy because by December 4, 1936, a liquidator had not been validly appointed is untenable. The presumption is that the Superior Court and the Commissioner performed their duties and that a liquidator has been appointed. The contention that the plan discriminates between holders of life policies and non-can policies is not supported by the record, and is in the teeth of the adjudication of the trial court that the plan was fair, just and equitable. As pointed out by the State Supreme Court, it must be presumed that the evidence adequately supported this adjudication. The apparent contention of *amici curiae* that the absence of special findings indicates the absence of competent evidence to support the order is contrary to the presumptions applicable on an appeal on the judgment roll alone.*

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*NOTE: We understand that Josiah E. Brill and Samuel H. Maslon, *amici curiae*, have not as yet been granted leave to file their brief in support of the petition for certiorari. Should such leave be granted, time would not permit a separate answer. Accordingly, we have decided to reply to their contentions.

A. PETITIONERS' CONTENTION THAT THE COMMISSIONER'S PETITION FOR HIS APPOINTMENT AS CONSERVATOR WAS INSUFFICIENT TO VEST THE SUPERIOR COURT WITH JURISDICTION IS WITHOUT MERIT, IT INVOLVES A MATTER OF STATE LAW WHICH THE STATE SUPREME COURT HAS DECIDED AGAINST THEM, AND PRESENTS NO FEDERAL QUESTION. [Answering Petitioners' Point A.]

As we understand petitioners' Point A (Pet. pp. 33-36), their contention is that the proceedings were special proceedings; that the Superior Court could obtain jurisdiction only on a sufficient petition; that the petition was insufficient; that consequently all orders (including those made by Judge Willis) were void, and that petitioners have, therefore, not been accorded due process.

Under the state law all civil remedies are either actions or special proceedings (C. C. P., sections 21, 22, 23). All special proceedings are statutory (as for instance eminent domain, enforcement of mechanics' liens, probate proceedings and many others). These special proceedings are found in the Code of Civil Procedure and other codes [R. 1531].

The State Constitution gives the Superior Court original jurisdiction in all civil cases and proceedings, with exceptions not here material (California Constitution, Article VI, Section 5, first pargraph).

The Old Company was a California corporation with its principal place of business in Los Angeles County [R. 2].

In 1936, section 1011 of the Insurance Code provided in part as follows:

> "Upon the filing, by the Commissioner, with the Superior Court in the county in which is located the principal office of such person in this state, of a verified application showing any of the following conditions to exist: * * *
>
> (d) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or creditors, or to the public. * * *.
>
> Or, upon the filing, by the commissioner, of a verified application accompanied by a certified copy of the commissioner's last report of examination of any person to whom the provisions of this article apply showing such person to be insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1 of this code, said court shall issue its order vesting title to all of the assets of said person, wheresoever situated, in the commissioner or his successors in office, in his official capacity as such, and directing the commissioner * * * to conduct, as conservator, the business of said person, * * *."

The Commissioner's petition for his appointment as conservator and for the vesting of the assets of the Old Company in him [R. 1-32] was verified [R. 9] and contained as an exhibit a certified report of examination [R. 11-32], dated July 21, 1936 [R. 12], as of December 31, 1935 [R. 13], showing a deficit of approximately $23,000,000.00 [R. 30-31]. The report concluded with

the statement that "from a survey of the above figures it is apparent that immediate action must be taken to protect policyholders" [R. 32]. The Commissioner alleged that he had joined in such report and he made it a part of his petition [R. 3]. He alleged "that said examination and report shows that respondent corporation *is* in such condition that its further transaction of business will be hazardous to its policyholders, its creditors and to the public; that said examination and report further shows that respondent corporation *is* insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1 of the Insurance Code of the State of California * * *" [R. 3].

The State Supreme Court said:

> "The petition for appointment as conservator, containing proper allegations, was filed July 22d." [R. 1528].

The Commissioner, by adopting the report and alleging that the same showed the Old Company to be in a hazardous condition, *ipso facto* made a finding to that effect, and the petition was proper under subdivision (d) of section 1011 of the Insurance Code. Although the report was made as of December 31, 1935, it was dated the day before his petition was filed and his allegation is that it shows the Old Company "is insolvent" [R. 3]. The Superior Court decreed (presumably upon competent evidence) that the Old Company was insolvent within the meaning of the Insurance Code both on December 31,

1935, and on July 22, 1936 [R. 1385] and that it was in a hazardous condition on July 22, 1936 [R. 1386]. The State Supreme Court approved this adjudication, saying:

> "The company was technically insolvent as that term is defined in the Insurance Code, but by no means bankrupt." [R. 1528.]

It appears from the foregoing that petitioners' contentions are not well founded in fact and are without merit and that the decision of the State Supreme Court is squarely against them. As petitioners took their appeal on the judgment roll alone, their assertion "that there was no evidence before the court or nothing by which it could determine that the Old Company was insolvent on July 22, 1936 * * *" (Pet. p. 35), is not supported by the record and is contrary to the presumptions [R. 1528, 1539].

The cases cited by petitioners do not lead to a contrary conclusion.

In *Murray v. American Surety Co.*, 70 Fed. 341, (Pet. pp. 33, 34) the question was whether the plaintiff, the receiver of a state bank, had capacity to sue. The Circuit Court of Appeals for the Ninth Circuit, in the light of decisions of the California courts, held that under the particular statute involved there was no authority in the Superior Court for the appointment of a receiver.

Smith v. Westerfield, 88 Cal. 374, was an appeal from an order of the Superior Court sitting in probate and

it was held that the court had acted in excess of its jurisdiction. However, the Supreme Court of California said:

> "Our appellate jurisdiction over the judgments of the Superior Court includes those in which that court improperly assumed jurisdiction, as well as those in which it was properly entertained."
>
> 88 Cal. 380, 381.

It follows that under any theory the State Supreme Court had jurisdiction over petitioners' appeal and therefore jurisdiction to determine that the Superior Court had jurisdiction, which it impliedly did by affirming the judgment. (Compare *Clary v. Hoagland,* 6 Cal. 685, 687-688; *Schrimsher v. Reliance Rock Co.,* 1 Cal. App. (2d) 382, 393; *Harris v. Seidell,* 1 Cal. App. (2d) 410, 417; *Standard Oil Company v. Missouri,* 224 U. S. 270, 280-281.)

The case of *East Tennessee V. & G. R. Co. v. So. Tel. Co.,* 112 U. S. 306 (Pet. p. 34) has no bearing on the case at bar. There on appeal from a decision of the Circuit Court, this court held that the trial court, upon removal of a special proceeding from the state court, was limited by the applicable provisions of the state law.

Petitioner's quotation of the statement (Pet. pp. 34-35) that insolvency proceedings are special and no intendments can be made in favor of the jurisdiction, appears in *Daman v. Hunt,* 47 Cal. App. 274, 281, which relied on decisions of the former Supreme Court under the California Constitution of 1849. It is to be noted that the Supreme

Court of California, in denying a hearing in the *Daman* case, expressly withheld its approval of the very language quoted and relied upon by petitioners (47 Cal. App. 289, 290).

While the record herein would sustain no other holding by the State Supreme Court than the one which was given, namely, that the allegations of the Commissioner's said petition were proper, we submit that even if the State Supreme Court had committed error in that regard, no federal constitutional question would be presented. Petitioners appeared, filed pleadings and presumably were heard in support thereof. They cannot complain of lack of due process. (*Doty v. Love*, 295 U. S. 64, 74.) The procedure in the state court satisfied the due process clause. (*Davidson v. New Orleans*, 96 U. S. 97, 104-105; *Dohany v. Rogers*, 281 U. S. 362, 369.)

Whether, under a proper construction of section 1011 of the Insurance Code, the petition that was filed was sufficient, is a matter of state law decided by the State Supreme Court, and its decision is conclusive here.

North Laramie Land Co. v. Hoffman, 268 U. S. 276, 282.

"Mere error of a court, if any there be, in a judgment entered after a full hearing, does not constitute a denial of due process of law."

Corrigan v. Buckley, 271 U. S. 323, 332.

B. THE ORDERS MADE BY JUDGE WILLIS ARE VALID AND ARE INDEPENDENT OF THE VOID ORDERS MADE BY JUDGE EDMONDS. [Answering Petitioners' Points B, C and E.]

Petitioners' contention under their points B (Pet. pp. 36 to 38), C (Pet. pp. 39 and 40) and E (Pet. pp. 43 to 45) are based upon a misconception of the facts and the decision of the Supreme Court of California. Their theory (Pet. p. 37), that the New Company claims title to assets lodged in it by the void orders of Judge Edmonds and that no other transfer has been made, is a repetition of the statements made in the petition proper and already has been noticed.

Their statement (Pet. p. 38), that the State Supreme Court tacitly held that the consent of the Old Company and the appearance of those making objections waived the void character of Judge Edmonds' orders, is plainly incorrect. The State Supreme Court distinctly held that Judge Edmonds' orders were void and it did not tacitly or otherwise hold that the void character had been waived.

Petitioners' further statement (Pet. p. 39), that the State Supreme Court held that Judge Willis by approving Judge Edmonds' orders made them valid, has reference to the paragraph of the opinion of the State Supreme Court [R. p. 1521] reciting the fact that Judge Willis in his order of August 11th ratified and adopted Judge Edmonds' order appointing the conservator. The State Supreme Court took pains however to point out that in the same order Judge Willis made the appointment *de novo* [R. pp. 1521-1522]. Even if the opinion of the State Supreme Court can be construed as holding that an order by a disqualified judge can be ratified and adopted

by a qualified judge, no constitutional rights of petitioners are thereby impaired, particularly where, as here, the order was also made *de novo*.

Petitioners complain of that portion of the opinion of the State Supreme Court holding that the Commissioner's seizure of the assets of the Old Company before he was validly appointed conservator was proper under section 1013 of the Insurance Code [R. p. 1528]. They urge that this was impossible in view of opinions of the California Supreme Court and other courts that statutory proceedings must be strictly followed. They also rely on section 1015 of the Insurance Code. But this was a matter of state law which the State Supreme Court conclusively determined contrary to petitioners' contention. Petitioners' rights were not affected by the seizure and it would seem that they have no constitutional complaint on account of preliminary steps taken by the Commissioner prior to the order of December 4, 1936, from which order alone they have appealed. Being policyholders they were at no time entitled to the possession of the assets and they are not aggrieved because the State Supreme Court held that the Commissioner was properly in control during the preliminary period.

The contention is made under petitioners' point E (Pet. pp. 43-45) that that portion of Judge Willis' order of August 11, 1936, which invested the Commissioner with title to the assets of the Old Company was futile, because petitioners say, "At that time there was nothing to conserve, nor any title in the old company to be vested in the Commissioner because he had parted with everything he had by his prior conveyance to the new company," (Pet. p. 43). They further say that it was impossible to vest title in the Commissioner without first taking back title

from the New Company (Pet. p. 44). Now petitioners cannot blow hot and cold. They cannot logically assert that the proceedings of July 22 were void (so that the Commissioner then had no title to convey) and in the next breath claim that title was passed by the Commissioner to the New Company on July 22, so that such title could not be vested in the Commissioner by Judge Willis' order of August 11th.

Petitioners say that Judge Willis' order to show cause, dated September 25, 1936 [R. 905-913] was an order to show cause why the void orders of Judge Edmonds should not be approved, referring particularly to pages 906 and 909 of the record. Nothing was said in the order to show cause about ratifying the prior orders of Judge Edmonds. All parties interested were required to show cause, among other things, why an order should not be made ratifying *the acts of the Commissioner.*

Petitioners assert (Pet. p. 44) that Judge Willis' order of December 4, 1936, confirmed *nunc pro tunc* the orders of Judge Edmonds [referring to the Record pp. 1387 and 1388]. Reference to the citation will demonstrate that Judge Willis ratified the various *acts of the Commissioner* but did not ratify the orders of Judge Edmonds.

The Supreme Court of California did decide that the petitioners had been accorded due process, but that court did not decide, as contended by petitioners (Pet. p. 44), that approval of the void orders was due process.

Petitioners' contentions under their points B, C and E, all relate to procedural matters not affecting their constitutional rights. Nothing said by petitioners under these points furnishes any basis for review by the Supreme Court of the United States.

C. THE STATE SUPREME COURT HELD AS A MATTER OF STATE LAW THAT THE COMMISSIONER COULD AND DID LAWFULLY CONDUCT THE BUSINESS OF THE OLD COMPANY THROUGH HIS CORPORATE INSTRUMENTALITY, THE NEW COMPANY. ASSERTED ERROR IN THIS REGARD DOES NOT PRESENT A FEDERAL QUESTION. NOR ARE PETITIONERS AGGRIEVED THEREBY. [Answering Petitioners' Point F.]

The State Supreme Court held that during the rehabilitation period the Commissioner lawfully conducted the business of the Old Company through his corporate agency the New Company and that the Superior Court validly approved such action. [R 1528-1529.]

Relying upon section 1035 of the Insurance Code and two other California statutes petitioners contend that the decision of the State Supreme Court "is void, because it is a direct violation of law" (Pet. pp. 46-47) and that the State Supreme Court thereby failed to apply the due process guaranteed by the federal constitution.

It seems too obvious to require argument that the question whether the Commissioner could or did lawfully delegate his authority was peculiarly a question of state law and required the interpretation of state statutes. Even if the interpretation were thought to be erroneous, that would not make the decision void, or furnish any valid reason for asserting lack of due process.

In *Quong Ham Wah Co. v. Industrial Commission*, 255 U. S. 445, a case coming to this court on a writ of error to the Supreme Court of California, it was said:

> "But it is elementary that this court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the State. *Commercial Bank v. Buckingham*, 5 How. 317, 342; *Johnson v. New York*

Life Insurance Co., 187 U. S. 491, 496; *Ross v. Oregon*, 227 U. S. 150, 162; *Ireland v. Woods*, 246 U. S. 323, 330; *Stadelman v. Miner*, 246 U. S. 544; *Erie R. R. Co. v. Hamilton*, 248 U. S. 369, 371-372." 255 U. S. 448.

Even if it be assumed that the New Company was temporarily a trespasser, it does not appear that petitioners are aggrieved by the decision holding the contrary. The Superior Court after full hearing confirmed the method and ratified all the Commissioner's acts. Petitioners as simple contract creditors were not entitled to the possession of the assets and the record is barren of any suggestion that their rights were impaired or prejudiced by reason of the operations. On the contrary the opinion points out the benefits accruing from such procedure. [R 1528.]

The cases cited by petitioners (Pet. p. 47) do not support their contentions. *Schechter v. United States*, 295 U. S. 495, involved the validity of a federal law under the federal constitution. In *Hentschel v. Fidelity & Deposit Company of Maryland*, 87 Fed. (2d) 833, the Circuit Court of Appeals of the Eighth Circuit made some observations as to the power of the Missouri Superintendent of Insurance under Missouri statutes. *Levezey v. Gorgas* (Pennsylvania) 4 Dall. 71 was a decision by the High Court of Errors and Appeal of Pennsylvania passing on a matter of state law. In none of these cases did this court deny to a state court the power to interpret its own statutes or hold that a construction such as was here given to the Insurance Code was violative of constitutional rights.

Petitioners' point F does not, we submit, present a federal question.

D. THE ASSERTED ERROR OF THE STATE SUPREME COURT IN CONSTRUING THE STATE INSURANCE CODE SO AS TO PERMIT THE REHABILITATION OF THE BUSINESS OF AN INSOLVENT INSURANCE COMPANY BY MEANS OF A NEW COMPANY DOES NOT PRESENT A FEDERAL QUESTION. [Answering Petitioners' Point G.]

Petitioners assert that the State Supreme Court after a long and "erroneous discussion" of certain New York cases, declares that the Commissioner has the implied power to rehabilitate the business of an insurance company by means of a new corporation (Pet. p. 49). They insist that the New York cases do not support the decision and further that there are no powers which may be implied from a special statute. The portion of the opinion to which petitioners refer may be found at pages 1534-1538 of the record.

Again it must be pointed out that the State Supreme Court had plenary authority to construe the California statute. The contention that such construction is erroneous does not raise a federal question.

Quong Ham Wah Co. v. Industrial Commission, 255 U. S. 445, 448.

Amici curiae, while purporting to argue petitioners' point G, apparently do not deny the state court the power to construe state statutes, but they seemingly urge that the statute as construed is invalid. Consideration of this contention more logically belongs under our answer to petitioners' point J.

E. THE PROVISION OF THE INSURANCE CODE OF CALIFORNIA, THAT THE COMMISSIONER AS CONSERVATOR MAY, SUBJECT TO THE APPROVAL OF THE COURT, ENTER INTO REHABILITATION AGREEMENTS, IS NOT VAGUE OR UNCERTAIN AND IS CONSTITUTIONAL. [Answering Petitioners' Point H.]

Section 1043 of the California Insurance Code provides in part that the Commissioner as conservator or as liquidator may "subject to the approval of said court * * * enter into rehabilitation agreements".

Petitioners assert (Pet. p. 49) that the clause quoted is so vague and uncertain that any action taken under it violates the first essential of due process of law, citing *Connally v. General Construction Co.*, 269 U. S. 385; *Cline v. Frink Dairy Co.*, 274 U. S. 445; *Standard Chemicals & Metals Corp. v. Waugh Chemical Corp.*, 231 N. Y. 51, 14 A. L. R. 1054, and *Small Co. v. American Sugar Refining Co.*, 267 U. S. 233.

The first two cases cited reiterate the well established rule, that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. The other two cases cited hold that contracts are not void because in contravention of a vague and uncertain statute. None of these decisions has any application to the case at bar. Section 1043 of the Insurance Code neither forbids nor requires the Commissioner to enter into rehabilitation agreements. Any

such agreement cannot and does not become effective until approved by the Superior Court and neither the Commissioner nor the other party to the rehabilitation agreement is placed in the peril of conforming to a vague or uncertain law.

On the contrary, section 1043 is a general grant of power to the Commissioner to be exercised in his discretion, subject to the control and approval of the Superior Court in the first instance and the revisory powers of the state appellate courts in the second instance.

It is usual for state laws to authorize an executor or administrator to enter into leases on the decedent's property, subject to confirmation by the court without specifying further particulars. It would be just as logical to argue that such laws are unconstitutional because of vagueness and uncertainty, as it is to make such argument in respect to section 1043 of the Insurance Code.

In any event, the term "rehabilitation agreements" has a well recognized meaning. We submit that petitioners' point H is without merit.

F. THE CONVEYANCE TO THE NEW COMPANY WAS NEITHER FRAUDULENT NOR VOID. [Answering Petitioners' Point I.]

Petitioners reiterate their contention that the only conveyance in favor of the New Company is the "deed and bill of sale" executed by the Commissioner in his purported capacity as liquidator of the Old Company on July 22, 1936 [R. 183-190] and that this was the conveyance which the State Supreme Court held to be valid although supported only by a void order (Pet. p. 52). Petitioners then call attention to the fact that the Old

Company joined in said deed and bill of sale [R. 190], insisting that the validity of that conveyance was not helped by this fact because the Old Company's joinder was void under the fraudulent transfer sections of the California Civil Code.

We have already pointed out that the Commissioner's said conveyance was ratified by Judge Willis in his order of December 4, 1936, and that presumably a new conveyance was made by the Commissioner on or after December 4, 1936, pursuant to the express authority contained in said order.

Respondents have never contended nor do they now contend that the New Company derives title by conveyance direct from the Old Company. The New Company's chain of title is through the Commissioner, as the State Supreme Court properly held [R. 1541].

The case of *Northern Pacific Railway Company v.* Boyd, 228 U. S. 482, cited by petitioners (Pet. p. 53), is not in point. In the case cited the stockholders purchased the assets of their company at foreclosure sale subjecting the same to the rights of certain creditors but ignoring Boyd who was not a party and who did not consent. In the case at bar the first transfer was from the Old Company to the Commissioner by virtue of the order of August 11, 1936, and the express provisions of section 1011 of the Insurance Code. The transfer from the Commissioner to the New Company was made pursuant to the order of court. All of the stock of the New Company is part of the assets of the Commissioner as conservator or liquidator.

G. THERE HAS BEEN NO IMPAIRMENT OF THE OBLIGATION OF CONTRACT IN VIOLATION OF ARTICLE I, SECTION 10 OF THE FEDERAL CONSTITUTION, NOR ANY UNLAWFUL DISCRIMINATION. [Answering Petitioners' Point J and the brief of *amici curiae*.]

Petitioner Wm. H. Neblett is the holder of a life policy issued by the Old Company. The other three petitioners hold non-can policies. Josiah E. Brill, *amicus curiae*, states that he holds a non-can policy (Br. of *amici curiae*, pp. 1, 2).

The petitioners make three contentions: (1) that the contracts of the life policyholders have been violated by compelling them to accept the New Company as the insurer in place of the old; (2) that the contracts of the non-can policyholders have been impaired by compelling them to take a reduction of benefits; (3) that the contracts of both classes of policyholders have been impaired by destroying their right to any benefits under the reorganization unless they assent to it (Pet. pp. 54-56). The brief of *amici curiae* apparently urges a fourth point, namely, that the plan makes an unlawful discrimination between holders of life policies and holders of non-can policies.

1. It is not correct to state, as petitioners do, that the holders of life policies are compelled to accept the New Company as insurer in the place of the Old. The Old Company having been found to be insolvent, the state, acting under its police power, took steps to protect all persons interested in the Old Company. The insolvency of the Old Company was brought about by factors over

which the state had no control. The plan of rehabilitation gives to holders of life policies two options: (1) to consent to the plan and have their policies assumed in full by the New Company, or (2) to dissent and file a claim with the Commissioner thereafter to be appointed liquidator. Under the rehabilitation plan the Commissioner holds certain assets and in addition the New Company is obligated to pay over to him the *pro rata* share of the reserves behind each policy of those policyholders who dissent from the plan. The evidence introduced before the Superior Court is not in the record. In view of the adjudications contained in the order of December 4, 1936, and the presumptions and intendments in favor of such order it must be presumed that dissenting holders of life policies will receive as much, or more, in payment of their claims as they would upon complete liquidation. The fact that difficulties overtook the Old Company did not give petitioner Neblett or the other life policyholders the right to insist on complete and final liquidation instead of rehabilitation (*Doty v. Love*, 295 U. S. 64, 70). Petitioner Neblett was, therefore, given the only two options to which he was constitutionally entitled, namely, to consent and have his policy assumed by the New Company, or to dissent and receive the full amount of his provable claim. Said petitioner and other life policyholders have no constitutional right to a third option, namely, liquidation instead of rehabilitation.

2. The holders of non-can policies likewise were given two options: (1) to consent to the plan and have the

policies unconditionally assumed by the New Company at from twenty to ninety per cent of the face value, depending upon the date on which the policy was issued, and conditionally with interest as to the remaining portions of each non-can policy payable out of certain portions of the profits of the New Company, or (2) to dissent from the plan and file a claim with the Commissioner as liquidator.

To meet the claims of dissenting non-can policyholders the Commissioner had certain assets, and in addition the obligation of the New Company to pay him certain additional sums.

Again it is necessary to point out that the evidence before the Superior Court is not in the record. In support of the order appealed from, it must be presumed that dissenting holders of non-can policies will receive as much, or more, as they would receive on complete liquidation. For the same reasons it must likewise be presumed that the benefits to the consenting holders of non-can policies will be of far greater value than benefits to them upon complete liquidation. While non-can policyholders by consenting accept a reduction of benefits measured by the face amount of their policies, they do not accept a reduction of benefits measured by the liquidating value of such policies.

The plan of rehabilitation preserves for their benefit as well as for the benefit of all policyholders the valuable good will, agency organization and going concern values [R. 1386].

3. Petitioners' third contention under this point, applicable to all classes of policyholders, is that if they do not consent to the plan they will be left with absolutely nothing (Pet. p. 56). This argument is based upon the fact that the plan contemplated that dissenters should file their claims with the liquidator and upon their assertion that no liquidator was appointed. We have pointed out the error of this contention earlier in this brief. It is a sufficient answer to say that it must be presumed that the Commissioner and the Superior Court performed their respective duties and that the Commissioner has been appointed liquidator of the Old Company.

4. *Amici curiae* apparently urge a fourth point, namely, that the plan is unlawfully discriminatory, in that life policyholders are taken into the plan on more liberal terms than the non-can policyholders. This exact contention was urged before the State Supreme Court and considered by it in its opinion [R. 1538-1541]. We consider that the State Supreme Court has completely answered this point and invite the court's attention to the paragraphs of the opinion appearing at the pages cited. The trial court adjudged that the plan and agreement was feasible and that the operations under said agreement were feasible [R. 1386], and that the agreement and the plan embodied therein were fair, just and equitable [R. 1387]. Upon appeal on the judgment roll alone, it must be presumed that these adjudications were supported by the evidence. As the State Supreme Court pointed out, dissenters of both classes are treated the same. They are

allowed and will be paid the amount allowed by law as their measure of damages [R. 1539]. The State Supreme Court further pointed out that the record demonstrates that under the circumstances existing in this case the difference in treatment between life policyholders and non-can policyholders who consent to the plan was justified [R. 1540].

Amici curiae urge two additional arguments which, however, will require but brief consideration. Referring to the fact that there were no special findings and that the State Supreme Court interpreted the Insurance Code as not requiring findings, *amici curiae* become confused and seem to take the position that the absence of formal findings is the same as the absence of any competent evidence. They seem to urge that the decision of the State Supreme Court in this respect amounts to an impairment of the policies executed before the passage of that code. They cite *National Surety Co. v. Coriell,* 289 U. S. 426, where an order approving a reorganization plan was reversed because the record affirmatively showed that the trial court was without definite, detailed or authentic information. *Amici curiae* insist that the same situation prevails in the case at bar. In this they are plainly in error. Absence of special findings does not indicate an absence of evidence necessary to support the judgment. In fact, the presumption is quite the contrary. It cannot be successfully maintained, we believe, that anyone has a constitutional right to require the trial court to make formal findings of fact and conclusions of law.

Concluding this branch of the argument, *amici curiae* admit that both the State Supreme Court and the trial court found that the Commissioner's revised plan was fair and equitable but they urge there is nothing to show that sufficient facts were developed so that this court can determine that no constitutional rights have been violated (Br. of *amici curiae*, 8, 9). It seems plain that the burden was upon the appellants below, petitioners herein, to demonstrate affirmatively that their constitutional rights have been violated. *Amici curiae* are in no better position, and cannot shift the burden to respondents, because petitioners elected to appeal on the judgment roll alone.

The contention of *amici curiae* that the sections of the Insurance Code here involved did not constitute a moratorium statute is beside the mark. The sections deal with the conservation, rehabilitation and liquidation of insurance companies and do not purport to be a moratorium statute. *Amici curiae* as well as petitioners insist that the decision of this court in *Doty v. Love*, 295 U. S. 64, does not sustain the decision of the State Supreme Court. The case cited, however, cannot be distinguished in principle and supports the decision for the point to which it was cited.

We respectfully submit that neither the petitioners nor *amici curiae* have adduced any valid reason why a writ of certiorari should be granted. Most of petitioners' points involve matters of state law and are grounded upon either a misconception of the record or the contention that the

State Supreme Court committed error in interpreting a state statute. Petitioners' remaining points and those urged by *amici curiae* do not indicate the presence of federal questions of serious import really and substantially involved in the decision of the Supreme Court of California. Accordingly, we respectfully submit that the petition for writ of certiorari should be denied.

T. B. COSGROVE,

JOHN N. CRAMER,

Counsel for Respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.

APPENDIX.

California Constitution, Art. VI, Sec. 5 (1st Paragraph):

SUPERIOR COURT, JURISDICTION. The superior court shall have original jurisdiction in all civil cases and proceedings (except as in this article otherwise provided, and except, also cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices or other inferior courts); in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for; and of all such special cases and proceedings as are not otherwise provided for; and said court shall have the power of naturalization and to issue papers therefor.

Code of Civil Procedure, Secs. 21, 22, 23:

21. DIVISION OF JUDICIAL REMEDIES INTO CLASSES. These remedies are divided into two classes:

1. Actions; and
2. Special proceedings.

22. "ACTION" DEFINED. An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

23. SPECIAL PROCEEDING DEFINED. Every other remedy is a special proceeding.

Insurance Code, Sec. 1011:

Upon the filing, by the commissioner, with the superior court in the county in which is located the principal office of such person in this State, of a verified application showing any of the following conditions to exist:

(a) That such person has refused to submit its books, papers, accounts or affairs to the reasonable inspection of the commissioner or his deputy or examiner.

(b) That such person has neglected or refused to observe an order of the commissioner to make good within the time prescribed by law any deficiency in its capital if it is a stock corporation, or in its reserve if it is a mutual insurer.

(c) That such person, without first obtaining the consent in writing of the commissioner, has transferred, or attempted to transfer, substantially its entire property or business or, without such consent, has entered into any transaction the effect of which is to merge, consolidate, or reinsure substantially its entire property or business in or with the property or business of any other person.

(d) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policy holders, or creditors, or to the public.

(e) That such person has violated its charter or any law of the State.

(f) That a certificate of authority of such person has been revoked under section 10711.

(g) That any officer of such person refuses to be examined under oath, touching its affairs.

(h) That any officer or attorney-in-fact of such person has embezzled, sequestered, or wrongfully diverted any of the assets of such person.

(i) That a domestic insurer does not comply with the requirements for the issuance to it of a certificate of authority, or that its certificate of authority has been revoked;

Or, upon the filing, by the commissioner, of a verified application accompanied by a certified copy of the commissioner's last report of examination of any person to whom the provisions of this article apply showing such person to be insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1 of this code, said court shall issue its order vesting title to all of the assets of said person, wheresoever situated, in the commissioner or his successors in office, in his official capacity as such, and directing the commissioner forthwith to take possession of all of its books, records, property, real and personal, and assets, and to conduct, as conservator, the business of said person, or so much thereof as to the commissioner may seem appropriate, and enjoining said person and its officers, directors, agents, servants and employees from the transaction of its business or disposition of its property until a further order of said court.

Insurance Code, Sec. 1013:

Whenever it appears to the commissioner that any of the conditions set forth in section 1011 exist or that irreparable loss and injury to the property and business of a person specified in section 1010 has occurred or may occur unless the commissioner so act immediately, the commissioner without notice and before applying to the court for any order, forthwith shall take possession of the property, business, books, records and accounts of such person, and of the offices and premises occupied by it for the transaction of its business, and retain possession subject to the order of the court. Any person having possession of and refusing to deliver any of the books, records or assets of a person against whom a seizure order has been issued by the commissioner, shall be guilty of a mis-

demeanor and punishable by fine not exceeding one thousand dollars or imprisonment not exceeding one year, or both such fine and imprisonment.

Insurance Code, Sec. 1015:

Immediately after such seizure, the commissioner shall institute a proceeding as provided for in section 1011 and thereafter shall proceed in accordance with the provisions of this article.

Insurance Code, Sec. 1035:

In any proceeding under this article, the commissioner shall have the power to appoint and employ under his hand and official seal, special deputy commissioners, as his agents, and to employ such clerks and assistants and to give to each of them such power as may by him be deemed necessary. The compensation of special deputy commissioners, clerks and assistants appointed to carry out the provisions of this article, and all expenses of taking possession of, conserving, conducting, liquidating, disposing of or otherwise dealing with the business and property of such person under this article, shall be fixed by the commissioner, subject to the approval of the court, and shall be paid out of the assets of such person.

Insurance Code, Sec. 1043:

In any proceeding under this article, the commissioner, as conservator or as liquidator, may, subject to the approval of said court, and subject to such liens as may be necessary mutualize or reinsure the business of such person, or enter into rehabilitation agreements. Such rehabilitation or reinsurance agreements shall provide that, subsequent to the date thereof and for such period of time

as the commissioner may determine, no investment or reinvestment of the assets of the person rehabilitated or reinsured shall be made without first obtaining the written approval of the commissioner.

Every party to such agreement, and every director, officer, agent and employee of such person, and every other person who knowingly in violation thereof directs or aids or assists in causing to be made an investment or reinvestment of any of said assets without first having obtained the written approval of the commissioner, or who makes such investment or reinvestment in nonconformity with the written approval of the commissioner then in effect authorizing such investment or reinvestment, is guilty of a public offense and shall be punished by imprisonment in the State prison not exceeding five years or in the county jail not exceeding two years, or by a fine not exceeding $5000, or by both such fine and imprisonment.